No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. The dispositive question in this case is whether an arrest by state officers on state-law charges qualifies as the "arrest" contemplated by 18 U.S.C. 3501(c). As demonstrated in the petition (Pet. 8-10), the context in which the term "arrest" is used requires the conclusion that the only relevant arrests are those made for violations of federal law. Respondent has failed to cast any doubt on the correctness of our statutory analysis. Indeed, respondent avoids any discussion of the language of the statute, except for a brief claim (Br. in Opp. 16-17) that the statute's reference to arrests effected by "any" law enforcement officers is broad enough to encompass state officials. That claim, however, is irrelevant to our submission. We do not contend that arrests by state officers cannot qualify under

Section 3501(c). Our contention instead is that the arrest, whether by federal or state officers, must be for a violation of federal law. Only such an arrest can sensibly be viewed as imposing upon the arresting officer the duty to "bring[ ] such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States." 18 U.S.C. 3501(c).

Respondent likewise does not seriously take issue with our submission that the rule adopted by the court of appeals—that state and federal custody must "always" be aggregated for purposes of pre-arraignment delay, Pet. App. 20a-21a n.8—is far more generous to criminal defendants than the supervisory rule this Court followed before the enactment of Section 3501, a rule that Section 3501 clearly was intended to limit. Under that supervisory rule, pre-arraignment delay caused by state officers could not be attributed to federal authorities unless the defendant demonstrated the existence of a collusive "working arrangement" for the purpose of depriving the defendant of a speedy federal arraignment. Unlike the Ninth Circuit, other courts of appeals continue to require that a defendant make at least that showing before state custody will be imputed to the federal government. See Pet. 12-13 (citing cases).

Respondent contends that this case is not an appropriate vehicle for examining the circumstances under which state and federal custody may be aggregated, because the record in this case does not clearly show the absence of a "working arrangement," and because "there may well have been a 'working arrangement' of sorts" here. See Br. in Opp. 13-16. The problem with respondent's contention is that, outside the Ninth Circuit, it is the *defendant's* burden to show "clearly" that state and federal authorities colluded and "that state custody was 'designingly utilized' to circumvent the prompt hearing requirement." *United States* v. *White,* 979 F.2d 539, 543 (7th Cir. 1992); see also

United States v. *Torres,* 663 F.2d 1019, 1024 (10th Cir. 1981) ("it was incumbent upon the appellants to show that state custody was used in order to circumvent" federal speedy arraignment requirements), cert. denied, 456 U.S. 973 (1982); *United States* v. *Rollerson,* 491 F.2d 1209, 1212 (5th Cir. 1974) (same). And that burden must be met with "facts, * * * not mere suspicion or conjecture" showing that "federal law enforcement officers induce[d] state officers to hold the defendant illegally so that they [could] secure a confession." *United States* v. *Coppola,* 281 F.2d 340, 344 (2d Cir. 1960) (*en banc*), aff'd, 365 U.S. 762 (1961); accord *United States* v. *Carter,* 910 F.2d 1524, 1528 (7th Cir. 1990), cert. denied, 111 S. Ct. 1628 (1991). Thus, far from supporting respondent's contention that this case is not a good vehicle for review, respondent's own description of the record as unclear and his attempt to substitute conjecture for fact confirm that the government would prevail in this case under the standards followed outside the Ninth Circuit.

Citing *Elkins* v. *United States,* 364 U.S. 206 (1960), respondent also contends (Br. in Opp. 17-20) that "[p]olicy considerations" support abandonment of the "working arrangement" requirement in favor of the rule adopted by the court of appeals. A contention that a new rule of law is justified by policy—despite the contrary language of the statute, the contrary decisions of this Court before the passage of the statute, and the contrary view of every other court of appeals to consider the question after passage of the statute—is hardly a reason for denying plenary review. In any event, as we explained in the petition (Pet. 12 n.1), this Court rejected the identical contention based on *Elkins* in *Coppola* v. *United States,* 365 U.S. 762 (1961) (per curiam).[1]

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[1] Respondent erroneously claims that *Coppola* does not foreclose his argument that the "working arrangement" rule should be recon-

2. Correction of the court of appeals' error on the aggregation issue will place respondent's confession within the statutory six-hour safe harbor, see 18 U.S.C. 3501(c), and will therefore obviate the need to consider the second question presented by this case. But even if the Court were to agree with the court of appeals' conclusion on the aggregation issue, certiorari would be warranted to review the court of appeals' conclusion that a confession given more than six hours after arrest may be suppressed solely to penalize the government for the delay, even when the delay identified by the court *followed* the confession.

Respondent concedes (Br. in Opp. 9-10) that the courts of appeals are divided on the course to be followed when a confession falls outside the statutory six-hour safe harbor—some courts follow the statutory mandate of 18 U.S.C. 3501(a) and exclude the confession only if it is shown to be involuntary, while others invoke supervisory

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sidered in light of *Elkins*, because *Coppola* involved a defendant who was not "detained for an unreasonable period of time before being promptly arraigned on the original state charges." Br. in Opp. 19-20 & n.5. Contrary to respondent's factual distinction, the government conceded in *Coppola* that the confessions at issue were elicited while the defendant was illegally detained "by reason of the failure of the police to arraign him with the promptness required by New York law." Brief for the United States at 44-45 n.30, *Coppola* v. *United States*, No. 153 (O.T. 1960); *id.* at 42-43, 70. The defendant in that case "was detained for 29 hours without seeing a judicial officer of any sort; and for 19 of these hours he was under the visitation of federal officers." *Coppola* v. *United States*, 365 U.S. at 764 (Douglas, J., dissenting). More importantly, the narrow factual distinctions suggested by respondent overlook the fact that the petitioner in *Coppola* argued that the Court should abandon the "working arrangement" requirement in light of its intervening decision in *Elkins*, Brief for Petitioner at 26-33, *Coppola* v. *United States*, No. 153 (O.T. 1960), and this Court expressly declined to do so. *Coppola* v. *United States*, 365 U.S. at 762 ("We find no merit in the other argument advanced by the petitioner.").

authority to suppress even voluntary confessions under the *McNabb-Mallory* line of cases. Respondent contends, however, that the differences in approach are "largely, if not entirely, semantic" because all courts "in reality" apply a "balancing test." Br. in Opp. 9, 11. That is not so. Some courts of appeals have strictly heeded the command of 18 U.S.C. 3501(a), that "[i]n any criminal prosecution * * * a confession * * * shall be admissible in evidence if it is voluntarily given." See, *e.g.*, *United States* v. *Shoemaker*, 542 F.2d 561, 563 (10th Cir.) ("Voluntariness is the sole test for admissibility of a confession"), cert. denied, 429 U.S. 1004 (1976).[2]

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[2] Respondent claims (Br. in Opp. 10-11) that courts of appeals that follow the voluntariness approach actually are engaged in "balancing," because those courts sometimes make reference to how the government used the period of delay, a factor that respondent believes is necessarily unrelated to free will. But courts that follow the voluntariness approach consider the use made of the period of delay in order to assess whether the defendant's time in custody was used "to employ the condemned psychologically coercive or third-degree practices of interrogators." *United States* v. *Beltran*, 761 F.2d 1, 8 (1st Cir. 1985) (brackets omitted); accord *United States* v. *Christopher*, 956 F.2d 536, 538-539 (6th Cir. 1991) (same), cert. denied, 112 S. Ct. 2999 (1992); *United States* v. *Bustamante-Saenz*, 894 F.2d 114, 120 (5th Cir. 1990) (delay did not result in "lengthy, hostile, or coercive interrogation"). Consideration of that factor therefore merely reflects the common-sense notion that third-degree practices are likely to elicit involuntary confessions, but that delays caused by travel, booking, or other routine processing, or even by the fact that the defendant in the particular case "refused to go before the magistrate until he had seen members of his family," *United States* v. *Shoemaker*, 542 F.2d at 563, present little danger of overwhelming the defendant's free will. That type of voluntariness analysis is far removed from the overt balancing of policy considerations against free will factors in which the court of appeals engaged in this case. See Pet. App. 23a n.10. For that reason, respondent is wrong in suggesting (Br. in Opp. 11-12) that the court of appeals' statement that respondent's confession was "involuntary" should preclude plenary review of this case.

Respondent also contends that the legislative history of Section 3501 indicates that Congress intended "to preserve a limited and more reasonable *McNabb-Mallory* rule—one which allowed a six-hour 'safe harbor' period before the rule applied and one which perhaps made suppression discretionary rather than mandatory." Br. in Opp. 9. That claim is unpersuasive. Respondent concedes (Br. in Opp. 7-8) that the bill that ultimately became Section 3501 unquestionably was intended to overrule the *McNabb-Mallory* rule when the bill emerged from the Senate Judiciary Committee. Respondent claims, however, that that clear intent was abandoned when the six-hour safe harbor period was later added as a floor amendment, a conclusion purportedly supported by two remarks made on the floor in support of the amendment. See Br. in Opp. 8. But even those two remarks merely reflect what is plain from the face of Section 3501(c)—a generalized concern that interrogations should not exceed six hours. They do not support the claim that suppression is authorized for confessions that fall outside that safe-harbor period. Those two remarks therefore cannot override Section 3501(a)'s command that all voluntary confessions "shall be admissible."

In any event, as we explained in the petition (Pet. 15-16), this Court's decision in *United States* v. *Mitchell*, 322 U.S. 65 (1944), which held that time elapsed *after* a confession may not be used to justify suppression, demonstrates that the rule adopted by the court of appeals is plainly wrong even if the broadest possible version of the *McNabb-Mallory* doctrine remains the law. Respondent's principal response (Br. in Opp. 12 n.2) is that the court of appeals' emphasis on the *post*-confession delay should be understood (contrary to what the court actually said) as having been intended to highlight the effect of the *pre*-confession delay. Apart from that unsupported assertion,

respondent can only suggest that review should be denied because the correctness of the court of appeals' decision under *Mitchell* is "a fact-specific question" unworthy of review. Br. in Opp. 12 n.2. The facts are not, however, in dispute. The court of appeals stated that suppression was warranted solely by the delay "from Monday afternoon to Tuesday morning," Pet. App. 21a, when it is undisputed that respondent confessed on Monday morning. See Pet. 8; Br. in Opp. 1. It is also clear, as the district court found, that the delay on which the court of appeals relied was caused solely by the fact that "the magistrate's calendar was full once booking was completed." Pet. App. 49a. A published decision authorizing suppression in those circumstances, in the teeth of directly contrary authority from this Court and from other circuits, see Pet. 16; see also *United States* v. *Rojas-Martinez*, 968 F.2d 415, 418 (5th Cir.), certs. denied, 113 S. Ct. 828 (1992), and 113 S. Ct. 995 (1993), warrants this Court's attention.

3. Respondent argues (Br. in Opp. 21-25) that this Court should deny plenary review because the court of appeals' decision will be subject to affirmance on the alternative ground that, by holding him in custody over the weekend, the state authorities violated the Fourth Amendment. A party may not, however, defend a judgment in his favor on an alternative ground unless that ground was "properly raised below." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Respondent did not argue in the district court or the court of appeals that the length of his detention violated the Fourth Amendment, or that the purported Fourth Amendment violation required suppression of his confession; he claimed only that his confession was obtained in violation of 18 U.S.C. 3501 and the Fifth Amendment.[3]

[3] Respondent's new claim is predicated on *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth

And because the court of appeals did not decide this case on Fourth Amendment grounds, that claim would not counsel against plenary review of the rule adopted by the court of appeals.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1993

Amendment's requirement of a "prompt" judicial determination of probable cause following a warrantless arrest, see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), generally means that a probable cause hearing must be provided within 48 hours of arrest. *McLaughlin* recognized that the 48-hour limit is subject to exceptions in cases "of a bona fide emergency or other extraordinary circumstance." *County of Riverside* v. *McLaughlin*, 111 S. Ct. at 1670. While respondent's waiver of his Fourth Amendment claim precluded the development of a record on whether extraordinary factors of the type contemplated by *McLaughlin* were present in this case, the record does reflect—and respondent appears to concede, Br. in Opp. 21—that the state authorities relied on a California statute that excluded weekends and holidays from that 48-hour period. See Pet. App. 57a. The automatic exclusion of weekends and holidays effected by that California statute was rejected by the Court in *McLaughlin*, 111 S. Ct. at 1665, 1670, but that rejection occurred nearly three years after the state officers relied on that provision of California law in this case. This Court's decision in *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), therefore would preclude respondent from obtaining suppression of evidence in these circumstances even if the Fourth Amendment was in fact violated, and even if respondent had preserved that claim.

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